TRANSPACC PROPERTY MANAGEMENT SDN BHD v. BADAN PENGURUSAN BERSAMA PANGSAPURI AMAN LARKIN & ANOR

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL APPEAL NO: BA-12ANCVC-110-07-2021]
25 APRIL 2022

Abstract – *Monies held in the developer's maintenance account and the sinking fund account are held on trust for the purchasers; once the monies are transferred to the joint management body's maintenance account pursuant to the Strata Management Act 2013 ('SMA'), the monies are no longer trust monies, and therefore, shall be used for the purposes as stipulated under s. 23(3) of the SMA.*

CIVIL PROCEDURE: *Judgments and orders – Garnishee order – Whether monies in developer's maintenance account and sinking fund account held on trust by developer for purchasers – Whether formed part of developer's asset – Whether no longer trust monies once transferred to joint management body ('JMB') – Whether monies standing to credit of JMB's maintenance account could be garnished towards settlement of JMB's judgment debt – Whether monies standing to credit of JMB's sinking fund account could only be used for meeting capital expenditures – Strata Management Act 2013, ss. 10(4), 11(4), 23(1) & 24(1)*

LAND LAW: *Strata title – Joint management body ('JMB') – Garnishee order against JMB – Whether monies in developer's maintenance account and sinking fund account held on trust by developer for purchasers – Whether no longer trust monies once transferred to JMB – Whether monies standing to credit of JMB's maintenance account could be garnished towards settlement of judgment debt – Whether monies standing to credit of JMB's sinking fund account could only be used for meeting capital expenditures – Strata Management Act 2013, ss. 10(4), 11(4), 23(1) & 24(1)*

The first respondent ('R1'), the joint management body ('JMB') of the sub-divided building ('Scott Tower'), took over the building management services from Meridian Inc Bhd ('D1') and Cemerlang Land Sdn Bhd ('D2'). Upon the failure and/or refusal of D1, D2 and/or R1 to pay the sums due and owing to the appellant, who had provided building management services, the appellant commenced an action at the Sessions Court ('SC') and obtained a judgment in default against R1. The SC allowed the appellant's *ex parte* application for a garnishee order ('first garnishee order') against R2, the bank where R1 maintained its maintenance account and sinking fund account for Scott Tower. R2 paid the sum to R1's solicitors in compliance with the said

order. The appellant's application for a second garnishee order against R2 for the balance of the judgment sum was dismissed by the SC. The monies standing to the credit of R1's maintenance account and sinking fund account with R2 could not be garnished because the accounts were held on trust pursuant to ss. 10(4), 11(4), 23(1) and 24(1) of the Strata Management Act 2013 ('SMA'). Hence, the appellant's appeal.

Held (allowing appeal):

(1) The monies in the developer's maintenance account and sinking fund account were held by the developer on trust for the purchasers before the formation of the JMB and management committee ('MC'). Clearly, once the monies in the said accounts were transferred to the JMB and then the MC, they were no longer trust monies held on trust by the developer for the purchasers. Therefore, pursuant to s. 23(3) of the SMA, monies standing to the credit of R1's maintenance account in R2 may be garnished towards settlement of R1's judgment debt to the appellant. Further, the amount that could be garnished by the appellant was the monies that were standing to the credit of R1's maintenance account in R2 at the date of service of the garnishee order to show cause for the second garnishee order by the appellant to R2. (paras 23, 25, 26 & 29)

(2) However, the monies standing to the credit of R1's sinking fund account could not be garnished towards the settlement of R1's judgment debt to the appellant. Section 24(2) of the SMA stipulates that the monies in a JMB's sinking fund account shall only be used for meeting capital expenditures. R1's judgment debt was not for a capital expenditure; it was for unpaid operating expenditure due and owing by R1 to the appellant for the provision of building management services for Scott Tower by the appellant. (para 27)

Case(s) referred to:

Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd [2008] 5 CLJ 737 CA ***(refd)***

Legislation referred to:

Strata Management Act 2013, ss. 10(4), (5), 11(4), (5), 15(1)(a), 17(1), 23(1), (2), (3), 24(1), (2), 27(2), 28(1)

For the appellant - Toong Hui Joon; M/s Valerie Chong & Co
For the respondents - Arham Rahimy Hariri & Mohamad Ariffuddin Hanafi; M/s Edlin Ghazaly & Assocs

[Editor's note: Appeal from Sessions Court; Civil Suit No: BA-A52NCVC-45-01-2019.]

Reported by S Barathi

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is the appellant's appeal against the Sessions Court's decision on 17 June 2021 to dismiss its application for a garnishee order against the second respondent ("R2") to garnish the monies standing to the credit of the first respondent's ("R1") maintenance account and sinking fund account maintained at the R2 bank.

[2] The appeal is allowed for the reasons set out in this judgment.

The Facts

[3] The appellant is a company providing property management services. R1 is the joint management body ("JMB") of the subdivided building known as Scott Tower Condominium ("Scott Tower"). R1 is established under the Strata Management Act 2013 ("SMA"). A JMB is a body corporate established under s. 17(1) of the SMA. It comprises of the developer and the purchasers of the parcel units in the development.

[4] R2 is a bank. R1's maintenance account and sinking fund account for Scott Tower, which it holds under the SMA, is maintained at R2.

[5] R1 was appointed to provide building management services for Scott Tower by building managing agent Meridian Inc Berhad ("D1") and Cemerlang Land Sdn Bhd ("D2") on 7 January 2015. On 7 October 2017, R1 took over the management and maintenance of Scott Tower from D1 and D2.

[6] The appellant had provided building management services. However, D1, D2 and/or R1 had failed and/or refused to pay the sums due and owing to the appellant for the building service provided. On 8 January 2018, the appellant terminated their services and demanded the sum of RM237,029.18 due and owing to the appellant. D1, D2 and/or R1 refused to pay the sums due and owing to the appellant for the period from January 2016 to January 2018. The appellant commenced action against D1, D2 and R1 at the Sessions Court for the sums due and owing. R1 was the third defendant in the appellant's action at the Sessions Court.

[7] On 19 July 2019, a judgment in default was entered against R1 for the sum of RM135,411.20 together with interest at the rate of 5% per annum from 24 January 2019 until the date of full settlement, and cost of RM1,000.

[8] On 21 October 2019, the Sessions Court allowed the appellant's *ex parte* application for a garnishee order against R2 ("first garnishee order"). On 5 November 2019, R2 paid the sum of RM32,513.65 to R1's solicitors in compliance with the said first garnishee order.

[9] On 5 February 2021, R1 applied for a second garnishee order against R2 for the balance of the judgment sum ("second garnishee order").

[10] On 17 June 2021, the Sessions Court dismissed the appellant's application for the second garnishee order. The learned Sessions Court Judge ("SCJ") held that the monies standing to the credit of R1's maintenance account and sinking fund account with R2 cannot be garnished because the accounts are held on trust pursuant to ss. 10(4), 11(4), 23(1) and 24(1) of the SMA.

Analysis

[11] Sections 10(4) and 11(4) of the SMA state that a developer shall hold the monies in the developer's maintenance account and the sinking fund account on trust for the purchasers.

[12] By virtue of the provisions in ss. 10(4) and 11(4) of the SMA, the monies standing to the credit of the developer's maintenance account and sinking fund account do not form part of the developer's property.

[13] Sections 10(5) and 11(5) of the SMA state that in the event the developer enters into any composition or arrangement with its creditors or has a receiving order or an adjudication order made against it or it goes into liquidation, the monies in the developer's maintenance account and sinking fund account shall vest in and must be held by the administrator, official receiver, trustee in bankruptcy or liquidator (as the case may be) and transferred into a maintenance account and sinking fund account in the name of the JMB.

[14] Additionally, prior to the expiry of the developer's management period, the developer is required under s. 15(1)(a) of the SMA to transfer to the JMB, all balances of monies in the developer's maintenance account and the sinking fund account, after payment of all the expenditure which have been properly charged to the accounts.

[15] Pursuant to s. 23(1) of the SMA, the JMB must open and maintain a maintenance account ("JMB's maintenance account") with a bank or financial institution for the purposes specified in s. 23(3). Section 23(2) states that the monies in the JMB's maintenance account shall consist of all the balances of the monies in the developer's maintenance account transferred by the developer to the JMB under s. 15(1)(a).

[16] Section 23(3) stipulates that the monies in the JMB maintenance account "shall be used solely for the purpose of meeting the actual or expected general or regular expenditure necessary" in respect of the matters detailed in s. 23(3), including:

(m) *paying any expenses, costs or expenditure in relation to the procurement of services*, including the engagement of consultants, legal fees or costs and other fees and costs, *properly incurred or accepted by the joint management body in the performance of its functions and the exercise of its power under this Act*; or

(n) *meeting other expenses of a general or regular nature relating to the maintenance and management of the building or land intended for subdivision into parcels and the common property*.

(emphasis added)

[17] The JMB is also required under s. 24(1) of the SMA to establish a sinking fund account ("JMB's sinking fund account"). The JMB is to transfer all the balance of the monies in the developer's sinking fund account transferred by the developer to the JMB, into the JMB's sinking fund account.

[18] Pursuant to s. 24(2) of the SMA, the JMB may only use the monies in the JMB's sinking fund account solely for the purposes of meeting the actual of expected capital expenditure in respect of the matters stipulated in the said section. Section 24(2) of the SMA reads as follows:

(2) The sinking fund account shall be used **solely for the purposes of meeting the actual or expected capital expenditure** in respect of the following matters:

(a) the painting or repainting of any part of the common property;

(b) the acquisition of any movable property for use in relation to the common property;

(c) the renewal or replacement of any fixture or fitting comprised in any common property;

(d) the upgrading and refurbishment of the common property; or

(e) any other capital expenditure as the joint management body deems necessary.

(emphasis added)

[19] From the provisions in the SMA as discussed above, the monies in the developer's maintenance account and the sinking fund account are held by the developer on trust for the purchasers, in order to protect the purchasers in the event the developer goes into administration or liquidation.

[20] As expressly provided in ss. 10(5) and 11(5) of the SMA, the monies in the developer's maintenance account and sinking fund account do not form part of the developer's assets.

[21] Hence, in the event the developer goes into any composition or arrangement with its creditors or has a receiving order or an adjudication order made against its or goes into liquidation, the monies in the developer's

maintenance account and sinking fund account shall vest in the administrator, official receiver, trustee in bankruptcy or liquidator, as the case may be, to be applied for all or any of the purposes for which the monies in the said developer's accounts are to be applied with the SMA.

[22] Once the monies in the developer's maintenance account and sinking fund account are transferred to the JMB's maintenance account and sinking fund account pursuant to the SMA, the monies are no longer trust monies but belong to the JMB. Also, once the balance of monies in the JMB's maintenance and sinking fund accounts are transferred to the management committee's ("MC") maintenance account and sinking fund account under s. 27(2) or 28(1) of the SMA, the monies belong to the MC.

[23] The monies in the developer's maintenance account and sinking fund account were held by the developer on trust for the purchasers before the formation of the JMB and MC. Clearly, once the monies in the said accounts were transferred to the JMB and then the MC, they are no longer trust monies held on trust by the developer for the purchasers.

[24] For this reason, I am unable to agree with the learned SCJ that the monies in R1's maintenance account and sinking fund account at the R2 bank are trust monies and for this reason cannot be garnished to pay the appellant the balance of the judgment debt due and owing by R1 to the appellant. I find that the SCJ was plainly wrong in concluding R1's maintenance account and sinking fund account are trust accounts.

[25] Section 23(3) of the SMA provides that R1 may use the monies standing to the credit of the maintenance account for the purposes of meeting expenditure for paying the costs, expenses or expenditure in relation to the services procured from the appellant for building management services.

[26] For this reason, I find that monies standing to the credit of R1's maintenance account in R2, may be garnished towards settlement of R1's judgment debt to the appellant.

[27] However, I find that the monies standing to the credit of R1 's sinking fund account in R2 cannot be garnished towards the settlement of R1's judgment debt to the appellant. This is because s. 24(2) of the SMA stipulates that the monies in a JMB's sinking fund account shall only be used for meeting capital expenditures. R1's judgment debt is not for a capital expenditure; it is for unpaid operating expenditure due and owing by R1 to the appellant for the provision of building management services for Scott Tower by the appellant.

[28] The Court of Appeal in *Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd* [2008] 5 CLJ 737; [2008] 5 MLJ 34; [2008] 5 AMR 225 held that a garnishee summons does not operate to attach the debts which became payable to a judgment debtor after the date of service of the garnishee

summons. The Court of Appeal held that a garnishee order only affected debts in existence at the date of service of the said garnishee summons, and any monies subsequently paid into the judgment debtor's bank account cannot be subject to the garnishee order.

[29] Therefore, in this instant case, the amount that can be garnished by the appellant is monies that were standing to the credit of R1's maintenance account at the R2 bank at the date of service of the garnishee order to show cause for the second garnishee order by the appellant to R2 ("the credit amount"). This credit amount is the sum to be stated in the garnishee order absolute as the amount to be paid by R2 to the appellant.

Decision

[30] For these reasons, the appellant's appeal is allowed. The SCJ's decision is hereby set aside.

[31] The matter is remitted to the Sessions Court for the R2 bank to disclose by way of affidavit the amount standing to the credit of R1's maintenance account at the R2 bank as at the date the garnishee order to show cause for the second garnishee order was served on R2, and for the Sessions Court to grant the garnishee order absolute accordingly.

[32] Cost of RM1,000 to be paid by R2 from the amount to be garnished to the appellant subject to the payment of the allocator fee.